No. 82-2078

In the Supreme Court of the United States

OCTOBER TERM 1982

RANDOLPH C. HACKFORD, LAWANNA KAY REED THOMPSON, ALLEN D. REYOS AND ORANNA BUMGARNER MOOSMAN, for themselves and for and on behalf of all other persons similarly situated, PETITIONERS,

v.

FIRST SECURITY BANK OF UTAH, N.A., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT FIRST SECURITY BANK OF UTAH, N.A.

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QUESTIONS PRESENTED

1. Is the Respondent Bank, which met its duties under the Trust Agreement with the United States, liable for the now perceived problems flowing from the 1954 enactment of the Termination Act?

2. Did the lower courts err in holding that there was no res judicata or collateral estoppel effect on any material issues in this case from the Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), which case involved different stock, different transactions, different instructions to the Bank, and market-making by bank employees?

3. Does the court of appeals' conclusion that assessable stock in a nonprofit grazing corporation was not a "security" within the meaning of the Securities Exchange Act of 1934 conflict with decisions of any other circuit?

4. Is review by this Court appropriate where petitioners do not contest the lower courts' conclusion that the statute of limitations had run on the claims of 422 of the 456 class members and where the timeliness issue of the claims of the remaining 34 class members was reserved?

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BRIEF FOR RESPONDENT FIRST SECURITY BANK OF UTAH, N.A.

STATEMENT OF THE CASE

As demonstrated by the number and scope of the Questions Presented in the Petition, petitioners seek review of the trial court's entire factual and legal adjudication, as affirmed completely by the court of appeals. Because of the multiplicity of issues raised by petitioners, the extensiveness of the evidence, and the incompleteness of petitioners' factual statement, a detailed recitation of the facts of the case is necessary.[1]

[1]The trial judge's Memorandum Opinion (App. C 29-52) extensively sets out the findings of facts relating to events now 20 years old. Those findings were based upon dozens of witnesses and literally hundreds of exhibits. The findings of the trial court are conclusive unless clearly erroneous. *United States v. General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

A. Proceedings Below.

On July 17, 1975, a class of mixed-blood Ute Indians who had been beneficiaries of the Affiliated Ute Indian Trust Agreement commenced an action against the trustee, First Security Bank,[2] for selling stock in the Antelope Sheep Range Company and Rock Creek Cattle Range Company ("Range Companies") held in trust to the Ute Indian Tribe ("Tribe") for an alleged inadequate price in breach of its fiduciary duty and in violation of Rule 10b-5, 17 C.F.R. § 240.10b-5. The action also included a second class of adult mixed-blood Ute Indians who alleged that the Bank aided and abetted the Tribe's fraudulent purchase of their Range Company stock in violation of Rule 10b-5.

The Honorable Bruce S. Jenkins held (i) that the Bank had no duty under the Trust Agreement to consult with the beneficiaries about the stock sale, and that there was no evidence either that it breached such a duty or that the beneficiaries were deceived (App. C 57-69); (ii) that the Range Company stock was not a "security" within the meaning of the Securities Exchange Act of 1934 because there was not an expectation of profit from the efforts of others (App. C 69-81); (iii) that there was no breach of fiduciary duty in the trustee's sale in 1960 of the Range Company stock because the trustee reasonably relied on the 1958 fair market appraisal in determining the sales price and because it followed the government-mandated bidding procedures in offering the stock to all known interested purchasers (App. C 96); (iv) that the claims of 422 of the 456 class members were time-barred (App. C. 96-106); and (v) that petitioners' arguments of res judicata and collateral estoppel were without merit (App. C 81-84, 100-02).

The United States Court of Appeals for the Tenth Circuit affirmed the district court on all grounds in an unpublished opinion (App. A)

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[2]First Security Bank of Utah, N.A. is a wholly-owned subsidiary of First Security Corporation. Affiliated companies are First Security Bank of Idaho, N.A., First Security Bank of Rock Springs, First Security State Bank, Utah Mortgage Loan Corporation, First Security Financial and Ed D. Smith & Sons.

and denied a Petition for Rehearing (App. B). The court of appeals held: (i) that petitioners' res judicata and collateral estoppel arguments failed because the factual issues in the case were critically different (App. A 10-11); (ii) that the Range Corporation stock was not a "security" (App. A 12-17); (iii) that the Bank as transfer agent did not owe a fiduciary duty to the non-beneficiary mixed-bloods who sold their stock to the Tribe (App. A 17-19); (iv) that the Bank did not breach its duties to the beneficiaries under the Trust Agreement (App. A 19-24); and (v) that all other contentions of the petitioners were "without merit" (App. A 24).

B. Statement of Facts.

In 1954 Congress passed the Ute Indian Supervision Termination Act (the "Termination Act"), 25 U.S.C. § 677 *et seq.*, providing for partition and distribution of tribal assets between the mixed-blood and full-blood members of the Ute Indian Tribe and for the termination of federal supervision over the mixed-blood members.[3] The Termination Act provided that the division of all tribal assets was to be agreed upon by the authorized representatives of the 1,314 full-bloods and the 490 mixed-bloods. For that purpose, the mixed-bloods organized themselves as the Affiliated Ute Citizens of Utah (hereinafter "AUCU") under a constitution and bylaws. Exh. P-3A.[4] The AUCU Constitution established a board of directors ("AUCU Board") of five members, with delegated power "to perform all duties and functions of the mixed-blood members as authorized representatives thereof."

In accordance with the Termination Act, the division of assets, including range lands, between the mixed-bloods and full-bloods, was accomplished by joint action of the AUCU Board and the Tribal Business Committee, under the supervision of the Bureau of Indian

[3]Much of petitioners' Brief focuses on the errors and wrongs of termination, and in effect seeks to visit those legislative sins on the head of the Bank. Since the Bank had no role whatsoever in that legislation, petitioners' effort is misplaced.

[4]All exhibit references are to trial exhibits.

Affairs ("BIA"), Exh. P-10, P-11, and with approval by the entire mixed-blood membership, Exh. P-6, P-7, P-8, P-13. The AUCU Board's "Plan for Distribution" provided that all lands received by the mixed-bloods should be valued and "recommendation shall be made as to feasible units for use by the Mixed-Blood members . . ." Exh. P-20. In 1958 the AUCU Board employed Charles F. Moore (formerly the BLM Regional Grazier in Utah) for 70 days of appraisal of these range lands received by the mixed-bloods in the division.[5] Moore's appraisal report, which was reviewed and approved by two BIA supervising appraisers, was "[t]o estimate the fair market value for the surface right for the subject property." Exh. P-25. Some 44,054.52 acres (appraised by Moore at $246,000) went into the Rock Creek Catle Range Company, and 128,408.58 acres (appraised at $246,000) went into the Antelope Sheep Range Company.

In 1958, the Range Companies were organized with title to a large portion of the range land. Exh. P-76, P-77. Each Range Company authorized issuance of 490 shares without par value, one share for each AUCU member. One cattle share entitled the shareholder to graze two and one-half cows for six months each year, and one sheep share entitled the shareholder to graze five sheep per year. The Articles provided that the corporations were nonprofit; that no dividends could be paid; that the stock was assessable without limitation; and that 85% of all income of the companies had to come from shareholder assessments. Exh. P-76, P-77. First Security Bank became transfer agent for the companies sometime after March 1961.

On July 28, 1960, the Secretary of the Interior executed the Affiliated Ute Indian Trust Agreement with defendant First Security Bank as trustee. Exh. P-98. There were 175 mixed-bloods, chiefly minors, designated as beneficiaries. The Trust Agreement directed that:

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[5]Petitioners incorrectly state that this appraisal was made by the BIA for the purpose of the division of lands between the mixed-blood and full-blood groups. The AUCU Board's resolution employing Mr. Moore, Exh. P-24, the Moore appraisal itself, Exh. P-25, and Mr. Moore's deposition testimony at trial all state unequivocally that the appraisal was to establish a fair market value for the range lands.

> The Trustee shall pay to or apply on behalf of each Beneficiary, at convenient intervals, such amounts of income and/or principal of that Beneficiary's portion of the trust fund as the Trustee in its sole discretion may deem advisable for the *maintenance, care, welfare, support and education of such a Beneficiary and for his family for whose care he is legally responsible.*

Exh. P-98 (emphasis added).

Prior to the 1960 adoption of federal regulations governing sales of Range Company shares, a large number of adult mixed-bloods negotiated sales of Range Company stock among themselves, referred to as "private treaty" sales, at an average price per *unit* (one share in each company) of $282.16.[6] Exh. P-101. Early in 1960, the AUCU Board began discussing the sale of Range Company stock to the Tribe. *E.g.*, Exh. P-75 (March 8, 1960). By March 31, 1960 the AUCU Board and the Tribal Business Committee had "thoroughly discussed" the possibility "of the full-blood members [purchasing] the stock of both corporations for the appraised value thereof." Exh. P-328. In response to an AUCU Board ballot to all mixed-bloods on selling the stock to the Tribe "at a price not less than the appraised value," there were 153 votes to sell and only few votes not to sell. Exh. P-75 (August 8, 1960).

On September 13, 1960, representatives of the Tribe met with the Bank's Trust Investment Committee and presented the Tribe's proposal to purchase the Range Company stock held in trust at $1,100 per unit, ten percent above the appraised value. Exh. P-158. The Bank determined to consider the interests of each beneficiary separately, and contacted the minors and guardians to ascertain their wishes with regard to retaining or selling the stock. Exh. 159. On

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[6]Petitioners contend that the Bank participated in the legal wrong of eliminating the private treaty sales. Petition, pp. 22-24. However, the mixed-bloods themselves sought to rescind the private treaty sales because they were at one-fourth the price offered by the Tribe. Exh. P-114; Testimony of Preston Allen, R. XI, p. 444-45; Exh. P-121. All private treaty sales prior to the adoption of the regulations were declared invalid by the BIA commissioner. Exh. P-108A.

September 22, 1960 the Bank authorized the sale of 147 of the trust's 175 units at a price of $1,100 per unit pursuant to the BIA regulation's offer and bidding procedure.[7] Exh. P-165. In its decision, the Bank considered as factors the absence of any potential dividends and the assessability of the stock, that many beneficiaries did not have funds available to meet their needs unless the shares were sold, that a number of the beneficiaries did not live near the range lands, and that the price of $1,100 per unit was a fair price, being 10% above the 1958 fair market appraisal.[8]

On September 23, 1960, the Trustee's offer to sell 147 of the 175 Range Company Units held in trust was transmitted to the superintendent to be offered pursuant to regulation *to all mixed-blood and full-blood members of the Tribe*, acting individually or as groups, *which included every known prior purchaser or interested purchaser of Range Company stock*.[9] In the initial offering, 272 shares (55% of the stock) were offered under the BIA procedure. Those 272 offers were accepted by only two parties, the Tribe and Margaret Sprouse. *See* Exh. P-173, P-174, P-176. The superintendent notified both

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[7]The regulations governing sales of Range Company stock required that a mixed-blood first offer to sell the Range Company stock to all members of the Tribe, both mixed-bloods and full-bloods, through a notice procedure, after which if there was no acceptance, the stock could be offered to nonmembers of the Tribe for the same price. 25 C.F.R. §§ 243.1 through 43.12. The regulations provided for a sealed bidding procedure where there were two or more acceptances.

[8]Petitioners suggest that the Bank did not have access to the Moore appraisal when it made its decision. *See* Petition, p. 3 n.7. However, the supervising trust officer clearly meant the Moore appraisal in his reference to "the value which the lands were appraised. . . ." Exh. 163. In addition, the assistant trust officer who petitioners claim never saw the appraisal (Petition, p. 5 n.11) testified, "I am sure I saw the appraisals. . . ." Transcript, p. 735.

[9]Included in the group to whom the offer was made were *all those individuals whom petitioners list as potential purchasers* and who they claim were "not allowed to" pay a higher price for the stock, *e.g.*, Joseph Arthur Workman, Calvin Hackford, Preston Allen, Margaret Sprouse. *See* Petition, p. 3 n.6. For this reason the trial court found an "absence of evidence of other serious prospective purchasers." (App. C 96).

parties that sealed bids would be accepted, and would be opened on November 3, 1960.[10] Subsequently, the Interior Department found that Margaret Sprouse, a mixed-blood, was acting in behalf of a non-Indian interest and therefore disqualified her, directing that the superintendent was to proceed with the sale to the Tribe "*whose bid is not less than the market value heretofore established for the stock.*" Exh. P-206 (emphasis added). The Tribe thereafter purchased 456 of the 490 issued Range Company units at a price of $1,100 per unit.

Petitioners also argue that "the court below ignored uncontroverted expert evidence . . . on the value of the land."[11] Petition, p. 4. However, plaintiffs offered no expert testimony on the sole valuation issue at trial: the value of the Range Company *stock* in September of 1960. The only expert testimony on the value of the *stock* was that its value in September of 1960 was $650 per unit. Transcript, p. 1484. A separate expert testified that the stock's value in terms of the grazing rights conferred was between $550 and $600 per unit in 1960-61. Transcript, pp. 1285-86. At trial three experts in trust administration gave uncontradicted testimony that First Security Bank had "acted in a prudent way in arriving at their decision to sell these shares, and they did, in fact, receive a fair price." *See, e.g.*, Transcript, p. 1523.

In 1969 these same class members sued the United States in the

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[10]Mrs. Sprouse filed an action in the United States District Court for Utah seeking a declaratory judgment that the Termination Act did not authorize the sale of the Range Company shares to full-bloods, either individually or collectively. Exh. P-193. The Tribe was held to be a qualified bidder under the Termination Act and allowed to proceed as a bidder for the Range Company stock. Exh. P-193A.

[11]Petitioners apparently base this contention on the testimony of their expert land appraiser, Richard Palmer. Petition, p. 4 n.10. This contention confuses the difference between the value of the *stock* and the value of the corporation's assets. Courts have consistently held that asset value is only one of a number of factors to be considered in valuing closely-held stock, and that the value of the stock is not equal to the value of the assets. *E.g., Louis v. United States*, 66-1 U.S.T.C. ¶ 12390 (N.D. Ill. 1965), *aff'd*, 369 F.2d 263 (7th Cir. 1966); *South Carolina National Bank v. McLeod*, 256 F. Supp. 913 (D.S.C. 1966).

Court of Claims alleging, among other things, that the sale of their Range Company stock had been at an inadequate price to their injury. *Affiliated Ute Citizens v. United States*, No. 156-69 (Ct. Cl.) Those claims were dismissed in their entirety by the Court of Claims (App. C 98-99 n.21,22).

REASONS FOR DENIAL OF THE WRIT

I. THE UNCONTESTED STATUTE OF LIMITATIONS HOLDINGS BELOW, WHICH PRECLUDE THE CLAIMS OF NEARLY ALL CLASS MEMBERS, MAKE REVIEW BY THIS COURT INAPPROPRIATE.

The trial court held that the claims of 422 of the 456 class members, including all the named plaintiffs, were barred by the applicable statutes of limitations (App. C 96-106). This conclusion followed from the fact that all the class members, by their attorney in this action, had filed the Court of Claims action in 1969 (more than six years prior to the commencement of this action) alleging injury from the sale of the Range Company stock at an inadequate price. The court of appeals implicitly affirmed that holding (App. A 24). The Petition is ineffectual because it does not contest that holding and thus does not provide a basis for reversing the lower court's dismissal of the claims of 422 of the 456 class members on grounds of untimeliness.[12]

II. THE LOWER COURTS APPLIED SETTLED PRINCIPLES OF LAW IN THEIR ADJUDICATION OF THE RES JUDICATA AND COLLATERAL ESTOPPEL ISSUES.

A. *In Arguing That the Appellate Court Refused to "Fol-*

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[12]The trial court left unresolved the issue of whether the claims of 34 of the minor beneficiaries were time-barred (App. C 106). The claims of those 34 beneficiaries would be the sole remaining portion of this case on remand. Moreover, in the event of such remand, the trial court would then be required to determine the reserved issue of whether the claims of those 34 remaining class members are also time barred.

low" the Mandate of This Court. Plaintiffs Mischaracterize The Appellate Court's Decision.

Petitioners state that the court of appeals declared "that it would not 'follow the Supreme Court's decision in *Affiliated Ute Citizens v. United States*,' " and characterize the court of appeals as "openly defiant" to this Court and as engaged in a "calculated effort to evade the mandate" of this Court. Petition, p. 8. However, petitioners patently misread that opinion since the court of appeals did not refuse to follow this Court's decision; rather, it specifically found unpersuasive "plaintiffs' claim that we are bound by collateral estoppel and res judicata" by applying the principle that "[b]oth doctrines require an identity of factual issues in the two cases" and concluding that "[h]ere, the facts underlying the plaintiffs' claims are different" (App. A 11). The court of appeals simply rejected petitioners' attempt to force their deficient claims in this case into the critically different factual framework of *Affiliated Ute*. Petitioners cannot show a departure from or disregard of this Court's pronouncements to justify the review they seek.

B. *The Lower Courts Correctly Found the Doctrines of Res Judicata and Collateral Estoppel Inapplicable To This Case.*

Petitioners argue that the doctrines of res judicata and collateral estoppel, by virtue of this Court's opinion in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), precluded the litigation of certain issues in this case. The trial court rejected those arguments, concluding that (i) this Court "adjudicated nothing relative to the Range Company shares" (App. C 82); (ii) the Range Companies involved in this case were distinctly different in character from the Ute Distribution Corporation (App. C 82-83); (iii) the *Affiliated Ute* case, "unlike this case, involves a claim that the Bank . . . engaged in market-making activities" (App. C. 100-01); and (iv) there was a "lack of identity of issues" (App. C 82). The court of appeals similarly rejected petitioners' arguments of res judicata and collateral estoppel on the basic ground that there was not an identity of factual issues (App. A 11). The conclusions of both lower courts are com-

pletely in accord with settled principles of law enunciated by this Court.

Petitioners essentially argue that "[t]he declaration of the Court of Appeals that '[b]oth doctrines [of collateral estoppel and res judicata] require an identity of factual issues in the two cases' is plain error." Petition, p. 11. Petitioners assert that the plain error was the court of appeals' failure to apply the doctrines to "*issues*, between the parties or their privies, and not merely to *facts*." Petition, p. 11. Because of this alleged error, petitioners argue that the lower courts failed to treat as resolved by *Affiliated Ute* "[t]he *issues* of 'trust' and 'duty' [and] the *issue* of whether the BIA appraisal was a fair market value." Petition, pp. 11-12. However, petitioners plainly misread the appellate court's test of whether there was "an identity of factual *issues*," which was consistent with directions from this Court:

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Allen v. McCurry, 449 U.S. 90, 94 (1980) (citations omitted). Thus, in order for the doctrines of res judicata or collatral estoppel to have applied, there must be an identity of issues of fact or law in both cases. There is no such factual or legal concurrence here on the issues suggested by petitioners.

On the issue of a "trust" relationship with the adult mixed blood sellers, petitioners state that in *Affiliated Ute* "[t]his Court affirmed the trial court's finding of a fiduciary relationship on the same facts involved herein . . ." Petition, pp. 8-9. But petitioners' conclusory assertion that the two cases involve "the same facts" is not correct.

In *Affiliated Ute* this Court held that the two bank employees "were obligated to act on behalf of the mixed-blood sellers" because they "were active in encouraging a market for the UDC stock among non-Indians . . . by soliciting and accepting standing orders from non-Indians," because the Bank received increased deposits and the two employees received gratuities therefor, and because the mixed-blood sellers "relied upon [the defendants] when they desired to sell their shares." *Affiliated Ute*, *supra* at 154. This Court held the Bank secondarily liable because of the acts of its employees. *Id.* at 154. This Court noted that "if the two men and the bank had functioned merely as a transfer agent, there would have been no duty of disclosure here." *Id.* at 152.

In this case, as to the adults, the Bank indeed functioned merely as a transfer agent. The Bank did not make a market in the Range Company shares "nor did the Bank undertake to advise the adults as to the sales of their shares or the price thereof . . ." (App. C 108). Moreover, "it was the mixed-bloods themselves who decided to sell and made the offers of sale" (App. C 108).[13] Thus, the factual issue in *Affiliated Ute* of whether the Bank's employees violated some kind of a fiduciary duty to the mixed-blood sellers of *UDC stock* was simply not an issue, legally or factually, in this case. Rather, since the Bank functioned merely as a transfer agent for the Range Companies, *Affiliated Ute* stands as controlling precedent for the result reached by the lower courts that the Bank had no such fiduciary duty to the mixed-bloods who were not trust beneficiaries.

Petitioners also contend that "[j]ust as clearly litigated was the *issue* of whether the BIA appraisal was evidence of fair market

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[13]In addition, the Bank was expressly instructed to discourage sales of UDC stock by mixed-bloods, *Affiliated Ute*, *supra* at 145-46, and the Bank retained possession of the UDC stock certificates, which bore a specific legend warning against sale or encumbrance, *id.* at 138 n.8. No such instructions were ever given as to the Range Company stock nor did those certificates bear such a legend or warning. On the contrary, it was contemplated that mixed-bloods who did not have a use for the grazing rights bestowed by the stock would sell or lease their shares.

value," Petition, p. 12, relying on the finding of the trial judge in *Affiliated Ute* that "the appraisals were not made for the purpose of fixing the value of the stock at the time of its sale to the Tribe." Petition, p. 4 n.9. However, the trial judge in *Affiliated Ute* did not determine that the Moore appraisal was not a fair market value appraisal (as petitioners contend), but only that its purpose was not to price the stock for sale in 1960. In this case the trial court found that the Moore appraisal was a fair market value appraisal when made, and that the Bank did not act imprudently in utilizing that appraisal two years later in arriving at a sales price that took into account a ten percent appreciation in the land values established by that appraisal (App. A 20-21; App. C 87-88). The trial judge in *Affiliated Ute* did not decide the issues in this case of whether the Moore appraisal was a fair market value appraisal when made and whether the trustee Bank properly relied on that appraisal two years later in ascertaining the price at which to submit the Range Company stock for bid.

Nowhere in this Court's findings in *Affiliated Ute* is the sale of the Range Company stock, either by the Bank as trustee, or by the adults, mentioned or addressed as a part of any claim or finding. The sales of the Range Company stock held in trust, the fair market value of that stock, and the Bank's conduct with regard to the sale by the adults of their Range Company stock were simply not "issues" in *Affiliated Ute*. Indeed, the difference is apparent in this Court summary of the claims in *Affiliated Ute* as involving "misstatements of material fact used by bank employees in position of market maker to acquire [UDC] stock at less than fair value." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 475 n.15 (1977). Thus, petitioners' arguments of res judicata or collateral estoppel are without merit and their adjudication below does not invite review by this Court.

III. THE CONCLUSION THAT STOCK IN A NONPROFIT GRAZING COMPANY WAS NOT A "SECURITY" DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

As a second reason for this Court's review, petitioners argue that

the court of appeals erroneously gave supremacy to state corporation law over federal securities law in concluding that the Range Company stock was not a "security," and further contend that such a holding is in conflict with the decisions of four other circuits. However, petitioners misstate the reasoning and holding of the court of appeals, which properly evaluated the Range Company stock in terms of the well-settled criteria set out in *SEC v. W. J. Howey Company*, 328 U.S. 293 (1946), and reaffirmed in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) (App. A 12-14). The asserted "conflict" among the circuits is therefore illusory.

A. *The Court of Appeals Did Not Premise Its Decision That the Range Companies Stock Was Not A "Security" On State Corporation Law.*

As the predicate for the asserted conflict among the circuits, petitioners argue that the court of appeals "allow[ed] provisions of state law to control the effect of the federal securities laws. . . ." Petition, p. 14. In support of that assertion, petitioners contend that "the sole justification offered by the court below for the conclusion that the capital stock given to Petitioners . . . was not a 'security,' was the claim that provisions of state corporation law prohibited 'enhancement of stock value.' " Petition, p. 14. However, for that contention petitioners seize upon one sentence (referring to the Utah Nonprofit Corporation and Cooperative Association Act) in the course of several pages of analysis on the element of an expectation of profit from corporate activity. Rather than turning its conclusion on state corporate law, the court of appeals analyzed the Range Company stock in terms of "whether the scheme involves an investment of money in a common enterprise with profits to come from the efforts of others." (App. A 12 quoting from *Howey, supra*). The court concluded that the stock "does not meet two elements of the *Howey* test: an expectation of profits and that the profits arise 'solely from the efforts of the promoters or a third party.' " (App. A 13). On the issue of expectation of profit, the court considered that the "corporations were to be nonprofit and to have at least 85 percent of

their income derived from assessments collected from shareholders'' (App. A 13), and that ''[t]he corporations were created to facilitate the use of range land by the shareholders, not as potential investments.'' (App. A 15). The court then observed that ''had the corporations been designed to profit the shareholders . . . they could not have been organized under the Utah Nonprofit Corporation . . . Act.'' (App. A 15). Thus, the court of appeals' reference to the state Nonprofit Corporation Act was merely one of a number of points leading to its conclusion that there was not an expectation of profit in the Range Companies. Since that decision was in accordance with well-settled principles of federal law and not in conflict with other circuits, review by this Court is not warranted.

— B. *The Lower Courts Correctly Concluded That the Range Companies Stock Was Not A ''Security'' Within the Meaning of the Securities Exchange Act of 1934.*

Both lower courts dismissed petitioners' Rule 10b-5 claims in part on the ground that the stock in the Range Companies was not a ''security'' within the meaning of the Securities Exchange Act of 1934. Each Range Company was ''a *nonprofit* grazing corporation'' and

> [a]ll income of the corporation, whether from stock assessments or otherwise shall be retained and used to pay the necessary and incidental expenses of this corporation and at least 85 percent of such income shall be derived from assessments collected from the stockholders and shall be used for the sole purpose of meeting such expenses or losses that may be incurred by the corporation.

Exh. P-76, P-77. The stock entitled each stockholder to limited cattle and sheep grazing privileges for his own livestock upon the corporation range. This aspect of stock ownership represented the only potential for profit for the stockholders, since they could graze their own livestock or assign or lease their grazing rights. Such grazing or leasing was not a corporate activity, and any profit therefrom would

be generated solely by the individual shareholder's efforts.

The Securities Exchange Act of 1934 states that, unless the context otherwise requires, "the term 'security' means any . . . stock." 15 U.S.C. § 78c(a) (10). In 1975, this Court construed this statutory language to mean that stock is a security only if it has the attributes of a security:

> We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." Rather we adhere to the basic principle that has guided all of the Court's decisions in this area:
>
> "[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336, 19 L. Ed. 2d 564, 88 S Ct 548 (1967).

Forman, supra at 848 (footnotes omitted).

The *Forman* decision reaffirmed the definition of "investment contract" set forth in *Howey*:

> We perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a security." In either case, the basic test for distinguishing the transaction from other commercial dealings is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S., at 301, 90 L.Ed. 1244, 66 S. Ct. 1100, 163 ALR 1043. This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

Id. at 852 (footnote omitted). While all of these attributes are absent in the Range Company stock, the most critical deficiencies are the absence of an expectation of profits from the efforts of others.

A securities transaction, by its very definition, is one in which capital is sought for profit-making purposes. In these corporations, there was no possibility or expectation of "dividends contingent upon the apportionment of profits," which this Court has deemed the most common and salient feature of "securities." *Forman, supra* at 851. This Court wrote in *Forman*: "The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes." *Id.* at 849. No reported case of which respondent is aware has ever held that stock in a nonprofit corporation, such as the Range Companies, is a "security" within the meaning of the Securities Exchange Act. *See, e.g., B. Rosenberg & Sons, Inc. v. St. James Sugar Cooperative, Inc.*, 447 F. Supp. 1, 3-4 (E.D. La. 1976), *aff'd*, 565 F.2d 1213 (5th Cir. 1977). Thus, absent some exceptional circumstance not present here, stock in a nonprofit corporation such as the Range Companies is not a "security" within the meaning of the 1934 Act.

The kinds of profits commonly associated with securities are explained and limited by the *Forman* opinion:

> By profits, the Court has meant either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of the investors' funds. . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased — 'to occupy the land or to develop it themselves,' as the Howey Court put it, *ibid.* — the securities laws do not apply.

Forman, supra at 852-53 (footnote omitted). In the Range Companies, any revenues derived from grazing would not be profit or dividends from the stock but merely earnings from the labors of the stockholder using the stock grazing rights himself. Moreover, normal appreciation in the value of real estate is not an investment return, and

no security is involved in such appreciated interests. *Grenader v. Spitz*, 537 F.2d 612, 618 (2nd Cir.) *cert. denied*, 429 U.S. 1009 (1976); *Johnson v. Nationwide Industries, Inc.*, 450 F. Supp. 948, 951-54 (N.D. Ill. 1978); I L. Loss, Securities Regulation 491-92 (2d ed. 1961).

In addition, under the test of a "security," any benefit, income, or profit to be derived by the shareholders must come from the efforts of others. However, the Range Companies were organized to maintain the range land so that the shareholders themselves could graze their sheep or cattle, or assign or lease their grazing rights to another. The purpose of the corporations was simply to make the land available so that the shareholders could use it themselves for grazing. Since the shareholders in the Range Companies bore the real burden of managing their own grazing rights, the element of the efforts of others is missing.

Finally, petitioners suggest that the lower court decisions exempt "an important segment of industry from needful regulation mandated by Congress in 1932-34." Petition, p. 19. It is difficult to conceive of nonprofit grazing corporations as an "important segment of industry" and even more difficult to perceive any need for regulation of the market in such shares.

IV. THE DECISIONS IN THE LOWER COURTS DO NOT INVOLVE OR THREATEN THE GOVERNMENT'S TRUST OBLIGATIONS TO THE INDIANS

As the final ground for review, petitioners conjure up a threat to "the rights of all dependent Native populations" from the "lower court's handling of the inter-related trust/Indian law issues . . ." Petition, p. 20. This far-reaching threat is seen by petitioners in the disposition of the issues of whether the Bank breached the Affiliated Ute Indian Trust Agreement and whether the standard of review for the alleged breach of trust claim was erroneous. However, the lower courts simply adjudicated, on well-settled principles of law, the two breach of trust claims alleged by petitioners.

A. *The Advisability of Termination or of the Bureau of Indian Affairs' Implementation Thereof Was Not At Issue In This Case.*

Petitioners' real complaint is against either the United States Congress for passing the Termination Act or against the Bureau of Indian Affairs for incorrectly implementing termination.[14] Indeed, the sweeping language of the Petition is addressed primarily, if not exclusively, to that issue. Nearly all of the matters of which petitioners complain are consequences of termination rather than actions of the Bank. For instance, petitioners complain that "the Bank implemented the sale of petitioners' only remaining land for no consideration other than the monetary one. . . ." Petition, p. 20. However, the Trust Agreement prepared by the Bureau of Indian Affairs required the Bank first to take into account and fund the maintenance, care, welfare, support and education needs of the beneficiaries.[15] The terms of the Trust Agreement were the definition of the Bank's duties, and the Bank bears no legal liability for the Termination Act or its consequences.

Finally, contrary to petitioners' contention, the decisions below pose no conflict to the decisions of the Court of Claims on termination. In *Yanktown Sioux Tribe v. United States*, 623 F.2d 159, 161 (Ct. Cl. 1980), cited by petitioners, the claims did not involve termination policy, but rather dealt with a tribe's claims *against the United States* for "improper handling of both land and trust funds." The Court of Claims' discussion of termination policy in *Klamath and Modoc Tribes v. United States*, 436 F.2d 1008, 1010-13, 1020-

[14]Petitioners did file claims against the United States in the Court of Claims in 1969 for certain alleged injuries in the termination process, including a claim that their Range Companies stock was sold at an inadequate price. *Affiliated Ute Citizens v. United States*, No. 156-69 (Ct. Cl.). Those claims were dismissed in their entirety.

[15]At the inception of the trust, 102 of the 175 trust beneficiaries had no assets other than the Range Companies stock deposited into their trust accounts. Exh. P-98(A). Thus, the Bank's obligation to provide "maintenance, care, welfare, support and education" mandated the sale of the Range Company stock of most of the trust beneficiaries.

21 (Ct. Cl.) *cert. denied*, 404 U.S. 950 (1971), recognized that Congress intended the federal government cease its trustee management over the property of terminated Indians but that it do so without diminishing the rightful compensation to those Indians and without harming them or the nonterminating Indians. Neither case challenges the trial court's conception of termination as removing governmental control over the mixed-bloods nor suggests that some duty is imposed on the Bank other than by the Trust Agreement. There is in this case no reviewable issue of whether termination was an advisable policy or what effect termination had on the federal government's duty to terminating Indians.

B. *The Government's Elimination of "Private Treaty" Rights, At the Behest of the Mixed-Bloods, Did Not Constitute A Breach of the Bank's Duty Under the Agreement.*

Petitioners complain that the elimination of the "private treaty" right constituted a breach of trust by the Bank. *See* Petition, pp. 21-26. However, it was the Bureau of Indian Affairs, at the express behest of the AUCU Board, which declared void any private treaty sales prior to the adoption of the regulations (App. C 64).[16] There was no evidence at trial that the Bank ever encouraged such a result.

C. *The Lower Courts Applied A Correct Standard of Review To Petitioners' Breach of Trust Claims.*

Petitioners finally urge that the lower courts erred by applying a good faith or reasonableness test to their breach of trust claims. Petition, p. 26. The Court of Appeals and trial court concluded that

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[16]The regulations expressly protected the rights of both mixed blood and full blood members to purchase Range Company shares so long as they paid to the selling member the price desired. Moreover, these regulations simply codified the intent of the Termination Act. The private treaty transactions before the adoption of the regulations, which were at one-fourth the purchase price paid by the Tribe, did nothing to promote the welfare of the mixed-bloods other than those who aggressively sought to purchase stock for inadequate prices.

the Bank "was under a duty to the beneficiaries to exercise the care and skill in dealing with the trust property required by the trust instrument and Utah law."[17] (App. C 19). Moreover, the only breaches of trust which petitioners allege are that the Bank "fail[ed] to entertain the competing offers," Petition, p. 25, and that the Bank sold the stock for an inadequate price, Petition, p. 29. However, the trial court as trier of fact found that the sale price was reasonable and adequate (App. C 87-96), and found that there was an "absence of evidence of other serious purchasers . . ." (App. C 96).

The proper standard of review flowed from petitioners' specific claims that the Bank breached the Affiliated Ute Indian Trust Agreement and that it violated UTAH CODE ANNO. § 33-2-1 (1963). Section 33-2-1 is a codification of the prudent man standard presently accepted by a majority of the states and in Utah. *Dipo v. Dipo*, 526 P.2d 923 (Utah 1974); RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); BOGERT, TRUSTS AND TRUSTEES, § 541 at 157-160 (2d ed. 1978). The question of whether a trustee has acted "prudently" is entirely a factual issue to be judged under the circumstances existing at the time of the trustee's decision. *E.g., In re Parks Trust*, 38 Wash. 2d 763, 238 P.2d 1205, 1208-09 (Wash. 1951). Such a standard has been applied in the federal courts. *E.g., Withers v. Teachers' Retirement System of New York*, 447 F. Supp. 1248 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2nd Cir. 1979). Moreover, there is nothing in the language of the Trust Agreement itself nor in the fact that the beneficiaries were Indians that imposed a higher duty on the Bank.[18]

The trial court found the Bank's actions in selling the 147 Range Company Units were clearly prudent. The asset sold was not a

[17]Petitioners argued to the court of appeals that the Bank failed to meet this prudent man standard, but did not contend that the trial court applied an incorrect standard of review.

[18]Petitioners suggest, without supporting reference, that the lower courts applied a good faith test. Petition, pp. 26-27. However, it is clear that those courts rather applied a prudent man test (App. A 19; App. C 84-96). Petitioners' discussion of the "good faith" standard in cases where the United States was trustee for Indians is therefore inapposite.

productive trust asset, the Bank followed appropriate trust procedures in the sale, and the sale was at the fair market price for the Range Company stock. The evidence at trial showed that the Bank was charged with a duty of care, support, maintenance and education for the beneficiaries. Exh. P-98A, R. XII. In reviewing these actions, three experts in trust administration testified that the Bank had acted prudently and properly. *See, e.g.*, Transcript p. 1523. Under these circumstances, the trial court's conclusion that the sale of the stock was prudent is clearly supported by the facts and consonant with prevailing case law. *E.g., Braman v. Central Hanover Bank and Trust Company*, 138 N.J. Eq. 165, 47 A.2d 10 (1946).

For these reasons, the lower court's review of the breach of trust claims utilizing the common law and statutory prudent man rule neither threatens Indian rights nor undermines Congressional purposes, and the decision does not merit review on that basis.

CONCLUSION

There is no issue in this case that falls within the criteria of Rule 17.1 as being appropriate for this Court's review. Moreover, the unchallenged statute of limitations holding below renders any review by this Court of the Questions Presented essentially meaningless. For these reasons, the Petition should be denied.

Respectfully submitted,

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